HOMEWEST SDN BHD v. VISION RETURNS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[COMPANIES WINDING-UP NO: 28NCC-543-06-2015]
17 MARCH 2016

COMPANY LAW: *Winding up – Inability to pay debts – Failure to make payment despite being served with statutory demand – Whether company commercially insolvent – Whether adverse effect of winding up order relevant in deciding petition – Companies Act 1965, ss. 218(1)(a) & (e)*

COMPANY LAW: *Winding up – Stay of proceedings – Pending disposal of appeal – Whether there were exceptional circumstances warranting exercise of discretion to grant short adjournment – Whether short adjournment could be allowed with condition that demanded sum should be paid into court – Whether adjournment would cause prejudice to petitioner – Companies Act 1965, ss. 221(1), 222 & 243(1)*

The petitioner obtained a judgment against the respondent company ('respondent') in the High Court on 20 May 2015 ('High Court judgment'). The petition herein had been filed based on the respondent's inability to pay the High Court judgment within the meaning of s. 218(1)(e) of the Companies Act 1965 ('CA'). The respondent's application to stay the execution of the High Court judgment was dismissed by the court. Subsequently, the respondent filed an application in encl. 9 for, *inter alia*, leave to file encl. 9 and a stay of the petition pending the disposal of the respondent's appeal to the Court of Appeal. The petitioner, in opposing encl. 9, contended that (i) s. 222 of the CA does not empower the winding up court to stay a winding-up petition; (ii) a winding up petition should be disposed of expeditiously; and (iii) there were no special circumstances to stay the petition. Therefore, questions raised in the petition were: (i) whether the respondent could apply to adjourn the hearing of the petition until the Court of Appeal had heard the respondent's appeal against the High Court judgment; and (ii) whether the respondent may resist the petition on the grounds that the respondent had a pending suit against the petitioner in the Sessions Court and the respondent's appeal had been partially allowed by the Court of Appeal.

Held (winding up respondent with costs):

(1) The respondent was a party to the petition. As such, the respondent did not require leave of the winding up court to file encl. 9. (para 11)

(2) There is a distinction between a stay of a winding up petition under s. 221(1) of the CA and a stay of winding up order under s. 243(1) of the CA. The s. 221(1) stay is applied for before the respondent company is wound up whereas a s. 243(1) stay can only be applied for after a

A winding up order of the respondent has been pronounced. Therefore, the respondent could only apply to stay the petition under s. 221(1) of the CA and not pursuant to s. 222. (paras 16 & 17)

(3) The general rule under s. 221(1) of the CA provides that a winding up petition should be disposed of expeditiously and no stay or lengthy adjournment of the petition should be allowed. Nonetheless, there are exceptional circumstances in this case that warranted the exercise of the winding up court's discretion under s. 221(1) to grant a limited stay or a short adjournment of the petition with a condition that the demanded sum should be paid into the court by the respondent. (para 20)

(4) The petition was solely based on the High Court judgment. If the respondent was wound up on 15 September 2015 or any subsequent date before 19 November 2015 and if the Court of Appeal reversed the High Court judgment, the respondent was entitled to set aside the winding up order. As the respondent's appeal would be heard on 19 November 2015, a short adjournment of hearing of the petition was granted with a condition that the respondent pay into the court the demanded sum. The short adjournment did not prejudice the petitioner in any manner. Even if the respondent's appeal is allowed by the Court of Appeal, the petitioner has the option to withdraw the petition on the next hearing date. This would save costs for the petitioner as well as ensure that there was no wastage of time and effort. (paras 20 & 23)

(5) The Court of Appeal decision did not affect the validity of the statutory demand, especially when the Court of Appeal had affirmed the sum due under the five progress claims. Further, the respondent had admitted the sum due under the five progress claims in the respondent's own affidavit (para 34)

(6) As the respondent had failed to pay any amount despite being served with the statutory demand, the respondent 'shall be deemed to be unable to pay its debts' under s. 218(2)(a) of the CA. On this ground alone, the respondent should be wound up under s. 218(1)(e). Even if the court did not invoke s. 218(1)(a) of the CA, the petitioner is entitled to wind up the respondent under s. 218(1)(e) of the CA if the petitioner could show that the respondent was commercially insolvent. The petitioner had proven on a balance of probabilities that the respondent was commercially insolvent and was not able to pay its debts when the debts fell due and payable. The adverse effect of the winding up order on the respondent was not relevant in deciding the petition. Hence, the respondent was wound up and the official receiver was appointed as the liquidator for the respondent. (paras 36-38)

Case(s) referred to:

Ambank (M) Bhd v. Malaysian Coal & Minerals Corporation Sdn Bhd (Kuala Lumpur High Court Companies Winding Up No. 28NCC-417-05-2015) (Unreported) ***(refd)***

Ataxtin Pty Ltd v. Gordon Pacific Developments Pty Ltd (1991) 102 ALR 245 ***(refd)***

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 591 HC ***(refd)***

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2007] 6 CLJ 613 CA ***(refd)***

De Montfort University v. Stanford Training Systems Pte Ltd [2006] 1 SLR 218 ***(refd)***

Eastool Industries Sdn Bhd v. Getfirms Electronics (M) Sdn Bhd (No 1) [2001] 6 CLJ 151 HC ***(refd)***

Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd [2015] 9 CLJ 640 HC ***(refd)***

Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2014] 7 CLJ 1 FC ***(refd)***

Harpers Trading (M) Sdn Bhd v. Davids Distribution Sdn Bhd [1999] 1 LNS 171 HC ***(refd)***

Infovalley Life Sciences Sdn Bhd v. Srimelan Sdn Bhd [2015] 10 CLJ 315 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Noble Specialty Sdn Bhd v. Sedap Food Industries Sdn Bhd [2009] 1 LNS 72 HC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors And Other Appeals [2013] 2 CLJ 893 FC ***(refd)***

Prestige Global Resources Sdn Bhd v. Gabungan Hartamas Sdn Bhd [2015] 2 CLJ 116 HC ***(refd)***

Quantum Far East (M) Sdn Bhd v. Kayla Beverly Hills Malaysian Sdn Bhd [2004] 7 MLJ 507 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1974] 1 LNS 136 FC ***(refd)***

Re Lo Siong Fong [1994] 1 LNS 188 HC ***(refd)***

Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd [1999] 1 CLJ 303 HC ***(refd)***

Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd [1998] 3 CLJ 409 HC ***(not foll)***

Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd [2000] 4 CLJ 72 HC ***(refd)***

Teng Foh v. Liwu Realty Sdn Bhd [1989[2 CLJ 275; [1989] 2 CLJ (Rep) 564 HC ***(refd)***

Ting Yuk Kiong v Mawar Biru Sdn Bhd & Anor [1995] 3 CLJ 136 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & 4 Ors [1995] 3 CLJ 493 FC ***(refd)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 8(2A)
Civil Law Act 1956, s. 4(1), (2)
Companies Act 1965, ss. 218(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (2)(a), 221(1), 222, 243(1), 291(1), (2)
Companies Act (Cap 50) [Sing], s. 258

For the petitioner - Yip Huen Weng (Wong Jyh Ling with him); M/s Richard Wee & Yip
For the respondent - S Ramesh (Mohd Faiz Abd Rahim with him); M/s Rastam Singa & Co

Reported by S Barathi

JUDGMENT

Wong Kian Kheong JC:

Two Issues

[1] This petition (this petition) raises the following two questions:

(a) whether the respondent company (respondent) facing a winding up petition filed by the petitioner company (petitioner) based on a judgment obtained by the petitioner against the respondent in the High Court (High Court's judgment), may apply to adjourn the hearing of this petition until the Court of Appeal has heard the respondent's appeal against the High Court's judgment (respondent's appeal); and

(b) whether the respondent may resist this petition on, among others, the grounds that the respondent has a pending suit against the petitioner in the Sessions Court and the respondent's appeal has been partially allowed by the Court of Appeal.

Facts

[2] On 20 May 2015, after a trial, the petitioner obtained the High Court's judgment. According to the High Court's judgment, the respondent was ordered to pay the following sums to the petitioner:

(a) a sum of RM2,415,639.88 (sum);

(b) interest at the rate of 5% per annum on the sum from 20 May 2015 until the date of full payment of the sum; and

(c) costs of RM30,000.

[3] The respondent's appeal was filed on 1 June 2015. I will discuss later in this judgment about the Court of Appeal's decision on the respondent's appeal.

[4] Based on the High Court's judgment, on 5 June 2015, the petitioner's solicitors served on the respondent a demand (statutory demand) under s. 218(2)(a) of the Companies Act 1965 (CA) for, among others, the

respondent to pay a sum of RM2,451,265.34 (demanded sum) as at 5 June 2015, within 21 days from the receipt of the statutory demand. The demanded sum consisted of the following: A

(a) the sum;

(b) interest amounting to RM5,625.46 calculated according to the High Court's judgment; and B

(c) costs of RM30,000.

[5] On 25 June 2015, the respondent applied to the Shah Alam High Court for an injunction to restrain the petitioner from presenting a winding up petition against the respondent based on the High Court's judgment (respondent's injunction application). The respondent's injunction application was however withdrawn on 9 July 2015 with liberty to file afresh and costs to be paid by the respondent to the petitioner. C

[6] The 21 days period specified in the statutory demand, ended on 26 June 2015. The respondent did not pay the demanded sum on or before 26 June 2015. Hence, this petition was filed on 29 June 2015 with the following prayers, among others: D

(a) the respondent be wound up;

(b) the official receiver (or) be appointed as the provisional liquidator of the respondent; and E

(c) costs of this petition be paid from the assets of the respondent.

[7] On 1 June 2015, the respondent applied to the Shah Alam High Court to stay the execution of the High Court's judgment (respondent's stay of execution application). The Shah Alam High Court dismissed the respondent's stay of execution application with costs on 22 July 2015 (dismissal of respondent's stay of execution application). F

Can Respondent Stay This Petition Pending Disposal Of Respondent's Appeal? G

[8] On 27 August 2015, the respondent filed an application in court encl. No. 9 (court encl. No. 9). In court encl. No. 9, the respondent prayed for the following, among others:

(a) leave to file court encl. No. 9 (first prayer in court encl. No. 9); H

(b) a stay of this petition pending the disposal of the respondent's appeal or until any time to be decided by this court (second prayer in court encl. No. 9); and

(c) costs in the cause. I

[9] In support of court encl. No. 9, the respondent's learned counsel submitted that the winding up court has a discretion under s. 222 of the CA to stay This petition pending the disposal of the respondent's appeal. Reliance had been placed on the High Court case of *Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd* [1998] 3 CLJ 409; [1998] 6 MLJ 437. According to the respondent's learned counsel, the respondent's appeal would be heard soon on 19 November 2015.

[10] The petitioner's learned counsel vigorously opposed court encl. No. 9 on the following grounds:

(1) Section 222 of the CA does not empower the winding up court to stay a winding up petition. The petitioner's learned counsel cited the following High Court cases:

(i) *Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd* [1999] 1 CLJ 303;

(ii) *Harpers Trading (M) Sdn Bhd v. Davids Distribution Sdn Bhd* [1999] 1 LNS 171; [2000] 5 MLJ 334;

(iii) *Quantum Far East (M) Sdn Bhd v. Kayla Beverly Hills Malaysian Sdn Bhd* [2004] 7 MLJ 507; and

(iv) *Noble Specialty Sdn Bhd v. Sedap Food Industries Sdn Bhd* [2009] 1 LNS 72;

(2) a winding up petition should be disposed of expeditiously as decided by the following cases:

(i) the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248;

(ii) the High Court's judgment in *Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd* [2000] 4 CLJ 72; and

(iii) my decision in *Infovalley Life Sciences Sdn Bhd v Srimelan Sdn Bhd* [2015] 10 CLJ 315; [2015] 1 AMCR 707, [2015] 3 MLRH 1; and

(3) there were no special circumstances which existed in this case to stay this petition. The petitioner's learned counsel relied on the following two Federal Court cases:

(a) *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; and

(b) *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1974] 1 LNS 136; [1976] 1 MLJ 131.

Respondent Does Not Require leave To File Court Encl. No. 9

[11] Before I determine the merits of the second prayer in court encl. No. 9, the respondent is a party to this petition. As such, the respondent does not require leave of the winding up court to file court enc. No. 9. There is thus no need for the first prayer in court encl. No. 9.

Section 222 CA Does Not Apply To Winding Up Petitions

[12] Firstly, I refer to ss. 221 and 222 of the CA as follows:

Powers of Court on hearing petition

221(1) **On hearing a winding up petition the Court may dismiss it** with or without costs **or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit**, but the Court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

(2) **The Court may on the petition coming on for hearing or at any time on the application of the** petitioner, **the company**, or any person who has given notice that he intends to appear on the hearing of the petition:

(a) direct that any notices be given or any steps taken before or after the hearing of the petition;

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;

(c) direct that oral evidence be taken on the petition or any matter relating thereto;

(d) **direct a speedy hearing or trial of the petition or any issue or matter**;

(e) allow the petition to be amended or withdrawn; and

(f) **give such directions as to the proceedings as the Court thinks fit**.

(3) Where the petition is presented on the ground of default in lodging the statutory report or in holding the statutory meeting, the Court may instead of making a winding up order, direct that the statutory report shall be lodged or that a meeting shall be held and may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

Power to stay or restrain proceedings against company

222 **At any time after the presentation of a winding up petition and before a winding up order has been made, the company** or any creditor or contributory may, *where any action or proceeding against the company is*

A *pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit*.

(emphasis added).

[13] In *Solid Kitchen*, at pp. 439-440, Rekhraj J decided as follows:

B *The petitioner had obtained a judgment on 17 April 1998 in the Kuala Lumpur Sessions Court SN 7-52-4945-97 against the respondent under a summary judgment procedure. The respondent has filed a notice of appeal to the High Court vide Civil Appeal No R1-12-194-98; and to date the appeal is pending disposal*. The respondent had also proceeded to file an application for the stay of C execution of the judgment; and the said application is also pending disposal by the sessions court. In the interim, the petitioner - relying on the sessions court judgment - proceeded to issue a statutory notice pursuant to s. 218 [CA], demanding of the respondent to pay the judgment sum within 21 days from the receipt of the said statutory notice; failing which the respondent shall be deemed to be unable to pay the debt D and an appropriate action shall be taken for the winding-up of the respondent company. Immediately upon the expiry of the 21-day period, the petitioner proceeded to file the petition.

This is an application by notice of motion taken out by the respondent against the petitioner that all further proceedings in the companies winding-up petition be stayed E *pending the hearing and decision of the respondent's Appeal No R1-12-194-98 pursuant to O. 92 r. 4 of the Rules of the High Court 1980, and or under the inherent jurisdiction of the court; and or in the alternative under s. 222 [CA].*

To my mind, such an application for the stay of winding-up petition is specifically provided for under s. 222 [CA], which reads:

F …

Presentation of winding-up petitions are not a means of execution proceedings envisaged under O. 45 of the Rules of the High Court 1980, but are independent proceedings taken under s. 218(1)(e) [CA], by proving the establishment of a 'debt due and payable'; in that it must be due at the time of the demand; and made G *enforceable by threat of winding-up proceedings. But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub-judice, and any presentation of the petition in the circumstances* H *is an abuse of the process of court, and the court will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s. 222 [CA].*

I now refer to the prayer of the respondent in the invocation of O. 92 r. 4 of the Rules of the High Court 1980 or in the exercising of the powers of the court under its inherent jurisdiction to strike or grant stay. I Order 92 r. 4 reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers

of the court to make any Order as may be necessary to prevent injustice or to prevent an abuse of the process of court.

Edgar Joseph Jr J (now FCJ), in the case of *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 at p 147 said:

… It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfil itself as a court of law' to uphold, to protect or to fulfil the judicial functions of administering justice according to law in a regular, orderly and effective manner.

But in the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, his Lordship whilst referring to and quoting 37 *Halsbury's Law of England* (4th edn) para. 10 said:

[Although Rules are a form of delegated legislation,] their function is to regulate the machinery of litigation; they cannot confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties … [The Rules of the High Court cannot therefore extend into the area of substantive law.]

(Emphasis added.)

Therefore, I am of the view that in the face of the substantive law under s. 222 (CA), the inherent powers of the court under the Rules of the High Court cannot be applied for or made available, as these powers are additional to, but not substantive, and therefore the court cannot proceed cumulatively, but only proceed specifically in exercising its discretion for the stay under s. 222 of the Companies Act. Stay of proceedings of the petition is hereby granted until the final disposal of the appeal.

(emphasis added).

[14] With respect, I am not able to follow *Solid Kitchen* for the following reasons:

(a) I start with the judgment in *Shing Hup Hin Construction*, at pp. 304-305 and 306, wherein Abdul Aziz Mohamad J (as he then was) decided as follows:

The respondent company against whom the present winding-up petition is brought is seeking a stay of the hearing of the petition until the trial of a civil suit brought by the respondent company against the petitioner company. The respondent company relies on s. 222 of the Companies Act 1965. Learned counsel for the petitioner company has raised a preliminary question to be answered, namely, whether s. 222 empowers the court to order a stay of the present winding-up petition. Authorities have been cited on both sides, but I think the question can be answered simply on a proper analysis of the manner in which s. 222 is constructed. …

…

The making of an application under s. 222, as represented by the words "may … apply", is to be done "At any time after the presentation of a winding up petition and before a winding up order has been made", that

is to say, during the pendency of the winding-up petition in question, which in this case is the present winding-up petition. That is the time factor. The event or case that gives rise to the need to apply is "where any action or proceeding against the company is pending", the "company" there being the company that is sought to be wound up, which in this case is the respondent company. That case or event must, of necessity, also be existing during the time factor, that is to say, during the pendency of the winding-up petition in question. Coupling the time factor with the case or event, we have a situation where, during the pendency of the winding-up petition in question, there is pending - that is to say, by necessity of logic, also pending - an action or proceeding against the company that is sought to be wound up. The action or proceeding that is also pending must be other than the winding-up petition in question, although it may be some other winding-up petition. Now what may be applied for and ordered under s. 222 is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding-up petition in question, which in this case is the present winding-up petition. The result is as if the word "other" had been added to the phrase "action or proceeding" in s. 222, but that word has not been included because, I think, the intention of s. 222 is so clear from the way it is constructed that it would have been unprofessional to attempt to enhance the clarity by adding the word.

…

In Foursea Construction (M) Sdn Bhd [1998] 3 CLJ 135; [1998] 4 AMR 3508, Rekhraj J, at pp. 3513 and 3514, held the view that where winding-up proceedings have been initiated against a company, an application by the company under, s. 176(1), which is about compromises and arrangements, must be made in the winding-up proceedings and a stay of the proceedings may be granted under s. 222. I respectfully disagree, not only for the reasons that I have given but also because a stay in connection with a proposed compromise or arrangement under s. 176 is to be granted by virtue of s. 176(10) and not s. 222. I note that, in Solid Kitchen Sdn Bhd v. Regal Development Sdn. Bhd. [1998] 3 CLJ Supp 409; [1998] 6 MLJ 417, Rekhraj J again held that the winding-up petition in question may be restrained under s. 222. I conclude by saying that s. 222 does not empower the court to stay the present winding-up petition. I dismiss the respondent company's application with costs.

(emphasis added);

(b) *Shing Hup Hin Construction* has been followed in the following cases:

(i) Steve Shim J's (as he then was) judgment in *Harpers Trading*, at pp. 335 and 336:

By a notice of motion (encl. 15), the respondent has applied, pursuant to s. 222 of the Companies Act 1965, for stay of winding up proceedings filed by the petitioner pending the disposal of the respondent's application for a restraining order under s. 176(10) of the same Act, the hearing of which has been fixed in Court I on 22 July 1999. …

At the outset, counsel for the petitioner has raised a preliminary issue of law relating to the interpretation and application of ss. 221 and 222 of the Companies Act 1965. More specifically, he raises the question of whether or not this court is empowered to grant the respondent's application for stay of the winding-up petition taken out by the petitioner against the respondent in the light of the factual situation in the instant case.

…

I now come to s. 222 which states:

…

It has been said that there are two High Court cases which have given conflicting interpretations on s. 222. They are Foursea Construction (M) Sdn Bhd [1998] 4 MLJ 99 and Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd [1999] 1 MLJ 167. I have had the opportunity of reading those cases. Whether their decisions can be said to be actually conflicting is, I think, a moot point. In any event, what is more significant is that in Shing Hup Hin Construction, the court certainly had the opportunity and advantage of hearing full arguments on the interpretation and application of s. 222 and further, the factual circumstances therein were more directly and materially in point. In my view, the learned judge had so admirably explained and analyzed the intricacies of that section that I do not find it necessary to say more. Suffice to say that I agree with him entirely. That being the position, I must conclude that having regard to the facts and circumstances of this case, this court has no power or jurisdiction under ss. 221 or 222 of the Companies Act 1965 to entertain the respondent's motion for stay of the winding up petition. Accordingly, on that ground alone, it is sufficient that I dismiss it with cost.

(emphasis added); and

(ii) the decision of Mohd Hishamudin bin Mohd Yunus J (as he then was) in *Noble Specialty* as follows:

Encl. 8B is a summons in chambers application by the respondent pursuant to section 222 [CA] seeking an order of this Court to stay the petitioner's present winding up petition against the respondent, until the disposal of the respondent's appeal to the High Court of Malacca against a decision of the Sessions Court, Malacca. …

…

Among the reasons stated for the application is that the respondent has filed an appeal to the High Court of Malacca against the judgment of the Sessions Court of Malacca, the subject matter of the petition; and the appeal is still pending before the High Court.

It is the contention of the learned counsel for the petitioner, in opposing the application, that the respondent's application is misconceived in that section 222 does not provide for the relief applied for, that is, a stay of

A *the present petition itself. In other words, the petitioner's contention is that the words 'where any action or proceeding against the company is pending' in that section refer to any action or proceeding other than the petition itself. In support of his contention, counsel for the petitioner relies on [Shing Hup Hin Construction]. …*

B *I accept the submission of learned counsel for the petitioner.*

It will be observed that the reasoning of Abdul Aziz J is very clear; and, in my view, the reasoning is correct: one has to interpret s 222 as if the word "other" is present before the word 'action' in the phrase 'where any action or proceeding against the company is pending'.

C *However, the learned counsel for the respondent, on his part, argues that I have the power to stay the present petition under section 222 and he relies on [Solid Kitchen]. …*

…

D *In Shing Hup Hin Construction, Abdul Aziz J, having taken note of Rekhraj J's decision in [Solid Kitchen], declined to follow the latter's decision. With respect, I am also disinclined to agree with the position taken by Rekhraj J. But I must also add here my observation that, unlike what had transpired before Abdul Aziz J in Shing Hup Hin Construction, and before me in the present case, upon reading Rekhraj J's judgment, as reported, it does not appear that the fundamental and*

E *preliminary issue as to whether or not the respondent/applicant in the case before his lordship, considering the nature of the stay sought, could have invoked section 222, was ever raised and argued before the learned Judge. The learned Judge appears to have merely proceeded on the footing that he had the power to grant the stay pursuant to section 222*

F *and that what was in issue before him was only the merits of the application.*

(emphasis added);

(c) my research has disclosed a Singapore High Court's decision in *De Montfort University v. Stanford Training Systems Pte Ltd* [2006] 1 SLR

G 218 on s. 258 of Singapore's Companies Act (CA (Singapore)). Section 258 of the CA (Singapore) is in *pari materia* with our s. 222 of the CA. In *De Montfort University*, at para. 25, Tay Yong Kwang J decided as follows:

H 25 Section 258 [CA (Singapore)] provides: … Although this section was referred to in the respondent's application, it seems to me that this section concerns the stay of suits against the company and does not apply to an application to stay a winding-up petition.

(emphasis added).

I I will discuss about *De Montfort University* later in this judgment; and

(d) there is another reason why s. 222 of the CA does not apply to stay a winding up petition. This is because s. 221(1) of the CA has specifically provided for the power of the winding up court to "adjourn the hearing

conditionally or unconditionally". According to the rule of statutory interpretation of *generalibus specialia derogant*, if there is a conflict between a specific provision and a general provision in the same statute, the specific provision should be preferred. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at 758-759, Gopal Sri Ram JCA (as he then was) in the Court of Appeal applied the maxim *generalibus specialia derogant* to give effect to a specific provision of the National Land Code (NLC) in preference to a general provision in NLC. As such, based on the rule of statutory interpretation of *generalibus specialia derogant*, the specific provision of s. 221(1) of the CA should prevail over the general provision in s. 222 of the CA.

[15] I have not overlooked the judgment of Abdul Malik Ishak J (as he then was) in *Quantum Far East* as cited by the petitioner's learned counsel. It was decided as follows in *Quantum Far East*, at pp. 509, 510, 511 and 512:

… The chronology of events may be summarised in this fashion:

(1) *Summary judgment was handed down by the learned senior assistant registrar ('SAR') on 25 June 2001 for part of the petitioner's claim amounting to the sum of RM567,000 ('the Judgment') in the D5 suit.*

(2) An appeal was filed by the respondent to the Judge in Chambers *against the SAR's decision and the learned Judge dismissed this appeal on 15 October 2001.*

(3) *The respondent being aggrieved then appealed to the Court of Appeal vide Court of Appeal Civil Appeal No W-02-968-2001.*

(4) *The respondent subsequently applied in the D5 court for a stay of execution of the judgment pending the hearing and determination of the appeal to the Court of Appeal. This stay of execution pending the appeal was granted by the D5 court on 20 February 2003 ('the D5 stay order').*

(5) *In the D5 suit, the respondent has a counterclaim.*

The Questions Posed

2 Should the winding-up petition be dismissed with costs or be stayed in view of the D5 stay order or should it be allowed to proceed notwithstanding the appeal to the Court of Appeal, and that it should not be struck off nor stayed. To put it bluntly, what is the effect of the D5 stay order of execution of the judgment on the present winding-up petition which is founded on that judgment which has been stayed?

…

The Decision of the Court

4 A stay of execution of the judgment in the D5 suit is not a stay of the winding-up proceedings because the petition for winding-up is not an execution. In *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd And Other Appeals* [2001] 4 MLJ 187 the Court of Appeal speaking through Gopal Sri Ram JCA (who wrote a separate judgment), aptly said at p 198 of the report

…

A 5 *In order to stay the present winding-up proceedings, there must be an application made to this court by way of an originating motion by the respondent and the petitioner should be given the right to challenge it. Here, the respondent has not applied to this court for a stay of the winding-up petition. But the respondent saw fit to apply for the stay of execution of the judgment in the D5 suit. Here too the respondent has filed its affidavits in opposition to the winding-up petition under the*
B *Companies (Winding-Up) Rules 1972. Under s. 221 [CA], the court is given very wide powers at the hearing of the winding-up petition to dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make an interim or other order that the court thinks fit. I am of the considered view that a stay of the winding-up proceedings is not permitted under s. 222 [CA]. The power to stay a*
C *winding-up is provided for under s. 243 [CA] and it is done only after the order for winding-up has been made by the court (Harpers Trading (M) Sdn Bhd v. Davids Distribution Sdn Bhd [2000] 5 MLJ 334 and Shing Hup Hin Construction Sdn Bhd [1999] 1 MLJ 167). And the application for a stay under s. 243 [CA] may only be made by the liquidator or any creditor or contributory. Upon an application under s. 243(1) [CA], the court may order the stay of the proceedings*
D *on such terms and conditions as the court may think fit (Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1991] 3 MLJ 325).*

…

8 *Thus, it is clear that winding-up proceedings can proceed until the judgment is set aside or where the judgment was obtained by fraud or collusion. That this is so is*
E *clearly reflected in the case of Banfoong Sydney (M) Sdn Bhd v. MIFC Credit & Leasing Sdn Bhd [1990] 2 MLJ 12 where Zakaria Yatim J (as he then was) succinctly said at p 122 of the report:*

Applying the principles laid down in *Re Derrygariff Investments Pty Ltd* (1982) 1 ACLC 558; 6 ACLR 751 and *Re Gasbourne Pty Ltd* (1984) 2 ACLC 103; 8 ACLR 618 to the present case, the first question to consider is whether
F the judgment obtained in default of appearance against the plaintiff is a regular judgment or whether the judgment was obtained by fraud or collusion. If there is allegation that the judgment was obtained irregularly or obtained by fraud or collusion, the court has the discretion to go behind the judgment.

G 9 *So it can be surmised that the petitioner, having the right to file the petition and initiate these proceedings, should not now be prejudiced by the D5 stay order because that stay order was granted by the D5 court and it has no bearing to the current proceedings. I reiterate that the judgment in the D5 suit is a regular judgment until and unless it is set aside or if it was obtained by fraud or deceit. Presently there are*
H *no allegations that the judgment had been obtained by fraud or deceit and hence the judgment still stands. The present petition, having been based on the inability of the respondent to pay, should be allowed to subsist and to continue and this court should hear the petition forthwith.*

…

I 12 *For all these reasons, I would answer the issues posed in this way, that, notwithstanding the D5 stay order of execution of the judgment, the present winding-up petition which is founded on the judgment which has been stayed must be heard by me forthwith. There are no two ways about it.*

(emphasis added).

[16] With respect to *Quantum Far East*, there is a distinction between a stay of a winding up petition under s. 221(1) of the CA (s. 221(1) stay) and a stay of a winding up order under s. 243(1) of the CA (s. 243 stay). In my view, the differences between a s. 221(1) stay and a s. 243 stay are as follows:

(1) a s. 221(1) stay is applied for before the respondent company is wound up. A s. 243 stay can only be applied for after a winding up order of the respondent company has been pronounced. Section 243(1) of the CA provides as follows:

> *At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit*.
>
> (emphasis added);

(2) a s. 221(1) stay may be applied for by a respondent company. However, a s. 243 stay may be sought by the wound up respondent company's:

(a) liquidator;

(b) creditor; and/or

(c) contributory;

(3) the test applicable for a s. 221(1) stay (which will be discussed later) is clearly different from the test to decide a s. 243 stay. The following cases have laid down the considerations to be taken into account by the winding up court in a s. 243 stay:

(a) the Federal Court's judgment delivered by Mohd Dzaiddin FCJ (as he then was) in *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & 4 Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709, at 716-718 (MLJ);

(b) Arifin Jaka J's (as he then was) decision in the High Court case of *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* [1995] 3 CLJ 136, at 139; and

(c) my decision in *Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd* [2015] 9 CLJ 640; [2015] 4 AMR 221; [2015] 6 MLRH 297, at para. 19; and

(4) generally, the effect of a s. 221(1) stay is interim in nature. The winding up court has the power to stay permanently a petition only on exceptional grounds (please see VC George J's (as he then was) judgment in the High Court case of *Re Lo Siong Fong* [1994] 1 LNS 188; [1994] 2 MLJ 72, at 82). If a s. 243 stay is granted, its effect is permanent and

A the winding up order is deemed to have never been made - please see the judgment of the Court of Appeal delivered by NH Chan JCA in *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 1 MLJ 830, at 833.

Can Respondent Stay This Petition Pending Disposal Of Respondent's Appeal?

B

[17] As discussed above, the respondent can only apply to stay this petition under s. 221(1) of the CA and not pursuant to s. 222 of the CA. I will now proceed to discuss the second prayer in court encl. No. 9 according to s. 221(1) of the CA.

C **[18]** In *Ambank (M) Bhd v. Malaysian Coal & Minerals Corporation Sdn Bhd*, Kuala Lumpur High Court Companies Winding Up No. 28NCC-417-05-2015 (Malaysian Coal & Minerals Corporation), I have followed *Maril-Rionebel* as well as cases from Singapore and England to decide the following:

D (a) a winding up petition should be disposed of expeditiously (general rule); and

(b) as an exception to the general rule, a winding up petition can only be adjourned if there exists exceptional circumstances.

E I have held as follows in *Malaysian Coal & Minerals Corporation*, at paras. 23 and 28-31:

> 23. **Under s. 221(1) CA, the winding up court may make any one of the 4 following orders (4 Possible Orders)**:
>
> F (1) **the winding up court may stay the petition with or without condition**;
>
> (2) the winding up court may make any interim order;
>
> (3) the winding up petition may be dismissed; and
>
> (4) the winding up court may wind up the respondent company.
>
> G **The 4 Possible Orders have been explained by VC George J (as he then was) in the HC case of *Tan Sooi Shin v. Kow Kek Hing* [1991] 3 MLJ 390, at 391, as follows:**
>
> *The said portion of s. 221(1) consists of three limbs, viz that on hearing the petition the court may (1) dismiss it with or without costs; or (2) adjourn* H *the hearing conditionally or unconditionally; or (3) make any interim or other order.*
>
> *It is to be noted that the arrangement of the words used makes it clear that 'with or without costs' has reference to the power to dismiss the petition, 'conditionally or unconditionally' to the power to adjourn the hearing, and* I *it follows that 'or other order' has reference to the power to the court to make any interim order. It is also to be noted that some further support for the view*

that 'or other order' relates to 'interim' orders has no general application, is obtained from the fact that the phrase used is 'make any interim or other order' and not 'make any interim order' and that there is a fourth limb to the subsection, viz 'or (4) make any other order'.

(emphasis added).

…

28. *Under s. 221(1) CA, out of the 4 Possible Orders, the winding up court has a discretion to stay the petition, with or without condition. As to how this discretion is exercised, I refer to Abdul Hamid Mohamad JCA's (as his Lordship then was) judgment in the Court of Appeal* case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at 266-269, as follows:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA. I agree entirely with his views. However, **I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted**. Indeed what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn. Bhd. v. Filotek Trading Sdn. Bhd.* [1999] 4 CLJ 135, *Antara Elektrik Sdn. Bhd. v. Bell & Order Berhad* [2000] 6 MLJ 385, *Sun Microsystems Malaysia Sdn. Bhd. v. K.S. Eminent Systems Sdn. Berhad* [2000] 4 CLJ 72 and recently *SP Setia Berhad v. Gasing Heights Sdn. Bhd.* [2001] 6 CLJ 55.

As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r. 32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court - see *Asia Commercial Finance (M) Berhad v. Lum Choon Realty Sdn Bhd* (Penang High Court Companies Winding-up No: 28-60-92). Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. **The effect is that the hearing and disposal of the petition is delayed**.

One of the most abused procedure adopted in winding up proceedings is the application to strike out the petition under O. 18 r. 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Berhad* [1999] 4 CLJ 135 I pointed out the undesirability of applying such procedure to a winding up petition:

> **Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal**. RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
>
> *The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage*. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
>
> Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.
>
> *In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).*

These views were reiterated in *Antara Elektrik Sdn Bhd v. Bell & Order Bhd* [2000] 6 MLJ 385 this time in Malay.

In *Sun Microsystems Malaysia Sdn Bhd* [2000] 4 CLJ 72, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding-Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of a High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.

On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you at the suit of ... And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (emphasis added.)

The trial date is a long way off. Indeed, there may not be none at all. It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding.

Finally, the same view was reiterated in *SP Setia Berhad* (Kuala Lumpur High Court Winding-up Petition No: D8-28-173-2000).

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions, which is unfair to the petitioners and clogging the court docket.

(emphasis added).

29. *I will describe the approach laid down by Abdul Hamid Mohamad JCA's judgment in Maril-Rionebel (M) Sdn Bhd as the "Expeditious Disposal Approach". As a matter of stare decisis, I am bound by Abdul Hamid Mohamad JCA's judgment in the Court of Appeal case of Maril-Rionebel (M) Sdn Bhd. In Infovalley Life Sciences Sdn Bhd v. Srimelan Sdn Bhd [2015] 1 AMCR 707, [2015] 10 CLJ 315, [2015] 3 MLRH 1, at paragraph 12 (Infovalley Life Sciences), I have followed Abdul Hamid Mohamad JCA's judgment in Maril-Rionebel (M) Sdn Bhd*.

30. The Expeditious Disposal Approach is consistent with cases from the following jurisdictions:

(1) *Singapore cases are highly persuasive as Singapore's Companies Act on winding up is in pari materia with our CA. The following decisions of the Singapore HC are pertinent*:

(a) Sinnathuray J decided as follows in *Re Pentasia (Pte) Ltd* [1979] 2 MLJ 59:

> *A petition for the winding-up of a company is a grave matter for the Company and for those who have dealings with the Company. Section 219(2) of the Companies Act [of Singapore] provides that commencement of winding-up by the court "shall be deemed to have commenced at the time of the presentation of the petition for the winding-up". The sections that follow spell out important consequences that affect a variety of matters. Some of them are that creditors are deprived of their remedies against the company; all actions by and against the Company come to a standstill; and, any disposition of property including any transfer of shares or alterations of the status of members of the Company is terminated. The cumulative effect is that a company, upon a petition for winding-up presented against it, cannot carry on business as outsiders will be reluctant to have dealings with it. It is because of these effects that section 221(1) of the Companies Act and Rule 32(2) of the Rules provide that on the hearing of a winding-up petition the court may either dismiss it or adjourn it conditionally or unconditionally.*
>
> *Now, as regards an adjournment it is at the discretion of the court. Having regard to the foregoing, I am of the view that except for a short adjournment to remedy technical matters relating to a petition, any other adjournment must be an exception rather than the rule as it will be prejudicial to the company. (See: Re Chapel House Colliery Co (1883) 24 Ch D 259 per Cotton L.J. at p. 268). It is therefore imperative that the winding-up of a company which cannot pay its debts must be seriously weighed, and once proceedings are commenced they must be prosecuted expeditiously.*
>
> *For the reasons I have given I refused the application for an adjournment of the petition. …*
>
> (emphasis added); and

(b) in *Re Pek Chuan Development Pte Ltd* [1988] 3 MLJ 140, at 143, Chan Sek Keong JC (as he then was) held as follows:

> *I agree with counsel for the company that, as a general rule, winding-up proceedings should be heard expeditiously even where, as here, a company is solvent on the business of company. In the case of a trading or manufacturing company, such proceedings may paralyse its business as suppliers and bankers may stop giving credit. Its whole existence is in doubt pending the disposal of the petition.*

(emphasis added); and

(2) English courts (in chronological order) have decided as follows:

(a) in *Re Metropolitan Railway Warehousing Co Ltd* (1867) 31 LJ Ch 827, at 830, Cairns LJ (as he then was) held as follows:

> *I am averse to adjourning or suspending the petition, for this reason, that I think it is always a very inconvenient thing for a company to have a pending petition for a winding-up order hanging over their heads. I think the court should, as far as possible, either make an order upon the petition for the winding up of the company, if it is a fit case, or, if not, dismiss the petition. There are many cases in which it cannot be done; but where that can be done, I think that is the better course, and the more so, because it is well known, if the petition is adjourned, it is adjourned with this consequence imminent over the company, if the winding-up order is made, the winding up will date back to the presentation of the petition, and avoid, therefore, or imperil anything that has been done by the company in the mean time.*
>
> (emphasis added);

(b) in *Re Boston Timber Fabrications Ltd* [1984] BCLC 328, at 332 and 333, Oliver LJ (as he then was) gave the following judgment in the English Court of Appeal:

> *… Counsel for the appellant (Mr. Stubbs QC) has referred us to a Practice Direction which was issued in 1977 by Brightman J (as he then was), a statement which represented all the views of the Companies Court and which was made with the concurrence of the Vice-Chancellor, in which attention is drawn to the undesirability of lengthy adjournments of winding-up petitions. …*
>
> *…*
>
> *It is quite easy to see why, in the case of a winding-up petition it is undesirable that there should be lengthy adjournments. If an order is made on a petition, it dates back to the date of the petition. The company in the meantime is put in the position of having to trade with a winding-up petition hanging over its head. Nobody knows where they stand; if there is, as there was here, an order made under s 227 in the interim, there may be all sorts of difficult questions about whether a particular disposition of the company's assets is, or is not a proper disposition. And a further matter of some considerable importance is this: If anyone else wishes to present a petition against the company, they find themselves, as a practical matter, blocked by a petition being already on the file, and that is of course particularly difficult where you have an adjournment of the sort which we have here, which is a general adjournment for an indefinite period, where the proposed petitioner cannot get the satisfaction of simply giving a notice that he intends to support the petition because he does not know when the petition is going to come on, if indeed at all. So he is thereby kept effectively out of a remedy which the statute gives him as creditor, and that is a most undesirable situation. It is not, therefore, surprising to find that the courts have set themselves against adjournments in the case of winding-up petitions. …*
>
> (emphasis added); and

(c) Robert Walker LJ (as he then was) decided in the English Court of Appeal case of *Re a debtor* (No 544/SD/98) [2000] 1 BCLC 103, at 116-117, as follows:

> *… However, it is precisely because of the far-reaching effect of those sections [in the United Kingdom's Insolvency Act 1986] (and comparable sections in the winding-up legislation) that the bankruptcy court and the companies court have a strong and well-established policy of discouraging long or repeated adjournments of bankruptcy and winding up petitions. The judge was right to reject the suggestion that he should allow a petition to be presented and then go into suspended animation.*
>
> (emphasis added).

31. *Based on the Expeditious Disposal Approach, the court's discretionary power to stay a winding up petition under s. 221(1) CA should be exercised sparingly and where there exists exceptional circumstances. Examples of such exceptional circumstances are as follows*:

(1) *in the HC case of Re Lo Siong Fong [1994] 2 MLJ 72, at 82, VC George J (as he then was) stayed permanently a winding up petition on the following grounds:*

> *In all the circumstances, I concluded that the petition was brought for a collateral purpose and in any event has not the remotest likelihood of being successfully proceeded with and ought to be stopped in its tracks.*
>
> (emphasis added); and

(2) *in Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd [1991] 3 MLJ 338, at 340, Chao Hick Tin JC (as he then was) in the Singapore HC, stayed the hearing of a winding up petition against the respondent company on the ground that the respondent company had, among others, 2 bona fide counterclaims against the petitioners which were based on substantial grounds and either one of the 2 counterclaims exceeded the judgment sums due to the petitioners from the respondent company*.

(emphasis added).

[19] Court encl. No. 9 and the hearing of this petition had been fixed on 15 September 2015. On that day, learned counsel for the petitioner and respondent had informed me that the respondent's appeal would be heard by the Court of Appeal on 19 November 2015.

[20] I am fully aware of the general rule under s. 221(1) of the CA as laid down in, among others, *Maril-Rionebel*, namely a winding up petition should be disposed of expeditiously and no stay or lengthy adjournment of the petition should be allowed. Nonetheless, there are exceptional circumstances in this case which warrant the exercise of this winding up court's discretion under s. 221(1) of the CA to grant a limited stay or a short adjournment of this petition with a condition that the demanded sum should be paid into court by the respondent. The exceptional circumstances which exist in this case, are as follows:

(1) This petition is solely based on the High Court's judgment. If I have wound up the respondent on 15 September 2015 or any subsequent date before 19 November 2015 (winding up order) and if the Court of Appeal reverses the High Court's judgment on 19 November 2015, the respondent is entitled to set aside the winding up order. This is clear from LC Vohrah J's judgment in *Teng Foh v. Liwu Realty Sdn Bhd* [1989[2 CLJ 275; [1989] 2 CLJ (Rep) 564; [1989] 2 MLJ 425, at 426, as follows:

(a) the petitioner had obtained a default judgment against the respondent company in a civil suit;

(b) based on the default judgment, the petitioner filed a winding up petition against the respondent company;

(c) before the hearing of the respondent company's application to set aside the default judgment in the civil suit, the petitioner withdrew the suit against the respondent company. The petitioner's learned counsel however still applied to the High Court to wind up the respondent company (in the absence of the learned counsel for the respondent company) and the respondent company was thereby ordered to be wound up; and

(d) the respondent company applied successfully to the winding up court to set aside its earlier winding up order as the petitioner had already withdrawn his suit against the respondent company. The High Court therefore had no jurisdiction under s. 218(1)(a) to (n) of the CA to wind up the respondent company when the petitioner's suit against the respondent company had been withdrawn and the petitioner could no longer rely on the default judgment as a basis for the winding up petition against the respondent company;

(2) as the respondent's appeal would be heard on 19 November 2015, I granted a short adjournment of the hearing of this petition (from 15 September 2015 to 23 November 2015 (after the hearing of the respondent's appeal)) (short adjournment). The short adjournment does not prejudice the petitioner in any manner because:

(a) the petitioner has the right to execute the High Court's judgment against the respondent, especially in view of the dismissal of respondent's stay of execution application. The petitioner is therefore not deprived of its right to enjoy the fruits of litigation in the form of the High Court's judgment; and

(b) the petitioner has been given post-judgment interest on the sum pursuant to the High Court's judgment. If the respondent is wound up in this petition, the petitioner would not be entitled to any more post-judgment interest on the sum from the date of the winding up

A order. This is clear from the Federal Court's judgment delivered by Zaleha Zahari FCJ in *Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors And Other Appeals* [2013] 2 CLJ 893, at 898, 904 and 906-909, which applies:

(i) s. 291(1) and (2) of the CA;

B

(ii) s. 4(1) and (2) of the Civil Law Act 1956; and

(iii) s. 8(2A) of the Bankruptcy Act 1967.

In other words, the short adjournment may be financially beneficial to the petitioner; and

C

(3) if a short adjournment is given and if the respondent's appeal is allowed by the Court of Appeal, on 23 November 2015, the petitioner has the option to withdraw this petition. This will save costs for the petitioner as well as ensure that there is no wastage of time and effort.

D **[21]** It is to be noted that *Maril-Rionebel* may be distinguished from this case as *Maril-Rionebel* does not concern a stay of the hearing of the winding up petition pending an appeal against the judgment which is the sole basis for the petition.

E **[22]** I have not overlooked the Singapore High Court's decision in *De Montfort University*. In *De Montfort University*, at paras. 31 and 35, the winding up court allowed a stay of the petition pending the determination of a suit filed by the respondent company against the petitioner because:

(a) the petition was not based on a judgment; and

F (b) the respondent company had disputed the debt due to the petitioner on substantial grounds.

[23] As this petition is based on the High Court's judgment and in view of the respondent's failure to comply with the statutory demand to pay the demanded sum within the 21 days period stipulated in the statutory demand,

G I exercise my discretion under s. 221(1) of the CA to impose a condition for the short adjournment, namely the respondent is required to pay into court the demanded sum within two months from 15 September 2015. In *Ataxtin Pty Ltd v. Gordon Pacific Developments Pty Ltd* (1991) 102 ALR 245, Heerey J decided in the Federal Court of Australia that a winding up petition can

H only be adjourned if security is given for the petitioner's debt. It was held in *Ataxtin*, at pp. 247, 248 and 249, as follows:

> *This is a contested application for the adjournment of an application to wind up the respondent, Gordon Pacific Developments Pty Ltd (the company).* … In essence the issues raised in argument were:
>
> I
>
> (1) *Since the debt of the applicant, Ataxtin Pty Ltd (Ataxtin), arises under a judgment of the Supreme Court of Victoria, should the winding-up application be adjourned pending the determination of an appeal to the Full Court against that judgment?*

…

In Re Amalgamated Properties of Rhodesia (1913) Ltd [1917] 2 Ch 115 the petitioning creditor had been the successful defendant in "extremely heavy litigation" brought by the company and had served a demand under a statutory provision equivalent to s. 460(2)(a) in respect of the taxed costs awarded in its favour. The company appealed against the judgment but made no application to the trial judge (Eve J) or to the Court of Appeal for a stay of execution. The winding-up petition came on for hearing before Sargant J.

…

Sargant J then considered the company's alternative argument for an adjournment. His Lordship followed an unreported decision of the Court of Appeal, Wyler and the Ibo and Nyassa Corp v. Lewis and Marks, where the petitioning creditor had been awarded costs by the Court of Appeal after a successful appeal against a judgment in favour of the company. The company then commenced an appeal to the House of Lords and, while that appeal was pending, the petitioning creditor presented a winding-up petition based on the costs order. Neville J thought that the petition should not be dismissed but should be stood over. The Court of Appeal, according to Sargant J in *Rhodesia* (at 123): " … apparently took the view that the petitioners were entitled to their order *ex debito justitiae* and accordingly made a winding-up order."

His Lordship considered that he should follow *Wyler*. He said (at 123): "In my judgment, therefore, the petitioners are entitled as a matter of right to a winding-up order, and, if I were not to make it, I should practically be doing what Eve J or the Court of Appeal ought to have been asked to do, if the respondents so desired - namely, to stay execution on the judgment pending the appeal."

However, there was an indication that the company might be able to provide security for the petitioning creditors' debt and Sargant J made a winding-up order, but directed that the order lie in the office until the end of the following week with a direction that, if in the meantime the company could give security for the payment of the judgment debt, the order would not be given out and the petition would be dismissed.

…

Thus Wyler and Rhodesia were both cases where the existence of an appeal by the company against the judgment founding the petitioning creditor's debt was not regarded as a sufficient ground for adjourning a winding-up petition. An adjournment (or the equivalent thereof) was only granted in Rhodesia because arrangements satisfactory to the petitioning creditor were made to secure that debt.

…

Although of course this is a discretionary matter, I think I should take the same course as did the courts in Wyler, Rhodesia and Roma Industries. There

A *is in the present case no equivalent of giving of security for the petitioning creditor's debt, only an undertaking not to dispose of the assets of the company, which is quite a different thing.*

(emphasis added).

B *Ataxtin* is a decision of the Federal Court of Australia as a court of first instance. The apex court in Australia is its High Court and not the Federal Court. *Ataxtin* is highly persuasive as our CA is based on Australian legislation.

[24] On 15 September 2015, I had earlier proposed to learned counsel for
C the petitioner and respondent that instead of the respondent paying the demanded sum into court (which does not earn any interest), I was inclined to impose a condition for the respondent to deposit the demanded sum into a fixed deposit bank account in the joint names of the solicitors for the petitioner and respondent (designated FD account). However, the
D respondent's learned counsel informed me on 15 September 2015 that he had no instruction from his client to deposit the demanded sum into a designated FD account.

[25] Premised on the above grounds, I made the following order in court encl. No. 9 on 15 September 2015:

E (a) This petition is stayed on the condition that the respondent is to pay the demanded sum into court within two months from 15 September 2015 (conditional stay); and

(b) costs of RM3,000 to be paid by the respondent to the petitioner.

F **[26]** In addition to the conditional stay, I fixed 23 November 2015 as the subsequent hearing date of this petition.

Court Of Appeal's Decision On Respondent's Appeal

[27] On 19 November 2015, the Court of Appeal allowed partially the
G respondent's appeal (court of appeal's decision). According to the court of appeal's decision, among others:

(a) the High Court's judgment was set aside except that the petitioner was entitled to be paid by the respondent, the petitioner's progress claims no. 1 to no. 5 which had been certified by the architect in question
H (five progress claims); and

(b) the petitioner's progress claims no. 6 and 7 were remitted back to the same learned High Court Judge to verify such claims. For this purpose, both the petitioner and respondent were entitled to adduce evidence at the High Court.

I

Should Respondent Be Wound Up?

[28] This petition had been filed based on the respondent's inability to pay the High Court's judgment within the meaning of s. 218(1)(e) of the CA. Section 218(1)(e) reads as follows:

> **Circumstances in which company may be wound up by Court**
>
> 218(1) **The Court may order the winding up if**:
>
> …
>
> (e) **the company is unable to pay its debts**; …
>
> (emphasis added).

[29] The respondent's affidavit affirmed by one Ms Lee Lai Heng on 21 November 2015, admitted that the respondent owed a sum of RM519,688.33 to the petitioner pursuant to the fivr progress claims (sum due under five progress claims).

[30] The respondent resisted this petition on the following grounds:

(a) the respondent had filed a suit against the petitioner in the Klang Sessions Court on 7 October 2014 (respondent's suit). In the respondent's suit, the respondent claimed for a sum of RM526,864.14 (sum claimed in respondent's suit) from the petitioner together with interest and costs. The sum claimed in respondent's suit exceeded the sum due under five progress claims. Hence, the petitioner could not rely on the sum due under five progress claims;

(b) the respondent is a housing developer. If the respondent is wound up, the respondent will suffer irreparable damage as follows:

  (i) the respondent's license as a housing developer may be in jeopardy;

  (ii) the respondent's credit facilities with the banks may be recalled or terminated by the banks and the respondent will face great difficulty in obtaining new credit facilities from financial institutions; and

  (ii) the purchasers of the respondent's development project and the respondent's suppliers will be adversely affected by the respondent's winding up; and

(c) the respondent is commercially solvent. Other than the petitioner, the respondent has no other creditor.

[31] The petitioner's learned counsel has contended that this petition should be allowed on the following grounds:

(a) the respondent had failed to pay the demanded sum within the 21 days period stipulated in the statutory demand. As such, the respondent is deemed unable to pay its debts under s. 218(2)(a) of the CA. Reliance had been placed by the petitioner's learned counsel on the following cases:

A (i) the Supreme Court case of *Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303;

(ii) the Federal Court's judgment in *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437;

B (iii) the Court of Appeal's decision in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 (*Muniammah*); and

(iv) Abdul Malik Ishak J's (as he then was) decision in the High Court case of *Eastool Industries Sdn Bhd v. Getfirms Electronics (M) Sdn Bhd (No 1)* [2001] 6 CLJ 151;

C (b) the petitioner had exhibited a copy of a search of the respondent's documents lodged with "Suruhanjaya Syarikat Malaysia" (SSM) which showed that the respondent had suffered a loss of RM1,013,082.00 according to the respondent's own audited accounts for the financial year ending 31 July 2014 (respondent's financial information). Such D evidence clearly showed the respondent's commercial insolvency.

[32] Section 218(2)(a) of the CA provides as follows:

Definition of inability to pay debts

218(2)A **company shall be deemed to be unable to pay its debts if**:

E (a) *a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay* F *the sum or to secure or compound for it to the reasonable satisfaction of the creditor*;

(emphasis added).

[33] In *Malaysia Air Charter Company*, at p. 451, Mohd Dzaiddin FCJ (as he then was) decided as follows in the Federal Court:

G Conclusion

For the above reasons, our answer to the two questions posed in the appeal is that s. 218(2)(a) of the Act should be liberally interpreted. A notice of demand under the subsection need not specify the exact sum due as at the date of the demand. So long H *the sum due exceeds RM500 and remained unpaid after a demand made without any reasonable explanation to the satisfaction of the court, there is therefore neglect to pay such sum within the meaning of the section. It should however be borne in mind that s. 218(2)(a) does not create separate grounds for winding-up, but provides a mode of proof available in aid of an application seeking a winding-up on the ground specified in s. 218(1), viz, that the company is unable to pay its debts* I *(Ataxtin). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independant evidence that it is solvent (Re Fabo).*

(emphasis added).

[34] Based on *Malaysia Air Charter Company*, the Court of Appeal's decision does not affect the validity of the statutory demand, especially when the Court of Appeal has affirmed the sum due under five progress claims. Furthermore, the respondent had admitted the sum due under five progress claims in the respondent's own affidavit. The following cases have held that if a construction contract has provided for any sum of money to be payable as certified by an architect (sum certified by architect), the sum certified by architect is due and payable:

(a) the Supreme Court's judgment delivered by Edgar Joseph Jr SCJ in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345, at 349, 350, 351, 356, 365 and 367;

(b) Jeffrey Tan FCJ's judgment in the Federal Court case of *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd* [2014] 7 CLJ 1, at 30-31;

(c) Jeffrey Tan J's (as he then was) decision in *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591, at 599-600 and 602, which has been affirmed by Zulkefli Makinudin JCA (as he then was) in the Court of Appeal case of *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2007] 6 CLJ 613, at 694; and

(d) my judgment in *Prestige Global Resources Sdn Bhd v. Gabungan Hartamas Sdn Bhd* [2015] 2 CLJ 116, at paras. 25-27.

[35] As the respondent has failed to pay any amount despite being served with the statutory demand, the respondent "shall be deemed to be unable to pay its debts" under s. 218(2)(a) of the CA. On this ground alone, the respondent should be wound up under s. 218(1)(e) of the CA.

[36] Additionally or alternatively, even if this court does not invoke s. 218(2)(a) of the CA, the petitioner is nevertheless entitled to wind up the respondent under s. 218(1)(e) of the CA if the petitioner can show that the respondent is commercially insolvent. I rely on the following cases:

(a) Gopal Sri Ram JCA's (as he then was) judgment in *Maril-Rionebel (M) Sdn Bhd*, at p. 260, as follows:

> *But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.*
>
> (emphasis added); and

(b) *Prestige Global Resources*, at sub-para. 28(c).

[37] The following appellate cases have held that whether a respondent company is able to pay its debts or not under s. 218(1)(e) of the CA depends on the "commercial solvency" test or "cash flow solvency" test, namely whether the respondent company is able to pay its debts when such debts are due and payable by the respondent company:

(a) Gunn Chit Tuan SCJ's (as he then was) judgment in the Supreme Court case of *Sri Hartamas Development*, at pp. 307 and 308;

(b) the decision of Ramly Ali JCA (as he then was) in the Court of Appeal case of *Muniammah*; and

(c) Jeffrey Tan JCA's judgment in the Court of Appeal in *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817, at 827-829.

According to the above appellate cases, a company's commercial solvency or cash flow solvency, does not depend on the "balance sheet solvency" test, namely whether the company's total assets (including non-liquid assets) exceeds its total liabilities. If a company has assets far exceeding its liabilities but the company is unable to pay its debts when such debts are due and payable, then the company is commercially insolvent.

[38] I am satisfied that independent of the application of s. 218(2)(a) of the CA, the petitioner has proven on a balance of probabilities that the respondent is commercially insolvent and is not able to pay the respondent's debts when such debts fall due and payable. This is because the respondent's financial information for the financial year ending 31 July 2014 lodged with the SSM, showed:

(a) the respondent had suffered a loss of RM1,013,082;

(b) the respondent's current liabilities totalled a staggering sum of RM2,428,682 while its non-current liabilities amounted to RM10,038. The respondent's total liabilities far exceeded its current assets of RM692,983 and non-current assets of RM823,296; and

(c) the respondent has an "unsatisfied" charge created on 16 April 2012 in favour of CIMB Bank Bhd for a sum of RM20,000.

[39] I am of the view that the respondent's suit and the sum claimed in respondent's suit cannot show the respondent's commercial solvency. This is because firstly, the respondent has not obtained any judgment against the petitioner in the respondent's suit. In other words, there is no debt due to be paid by the petitioner to the respondent. Even if the respondent has obtained any judgment against the petitioner in the respondent's suit, this does not mean that the respondent is able to pay its own debts when such debts are due and payable. This is because a respondent company may have

substantial debts due to the respondent company by the respondent company's creditors but the respondent company may still be commercially insolvent for not being able to pay its debts which are due and payable.

[40] In respect of the adverse effect of the winding up order on the respondent, such an effect is not relevant to decide this petition. As elaborated above, if the respondent is commercially insolvent, this petition should be allowed despite the adverse consequences arising from the winding up order. It is to be borne in mind that the respondent is the author of its own misfortune by not paying the sum due to the petitioner in the first place.

[41] Premised on the above reasons, I wind up the respondent with costs and appoint the OR as the liquidator for the respondent.

[42] In closing, regarding the respondent's suit, the OR has a discretion to:

(a) continue, compromise or withdraw the respondent's suit - please see Gopal Sri Ram FCJ's judgment in the Federal Court case of *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785, at 795; or

(b) authorise the respondent's creditor or shareholder (not its director) to continue the respondent's suit - Zaitun Marketing, at pp. 795-796.